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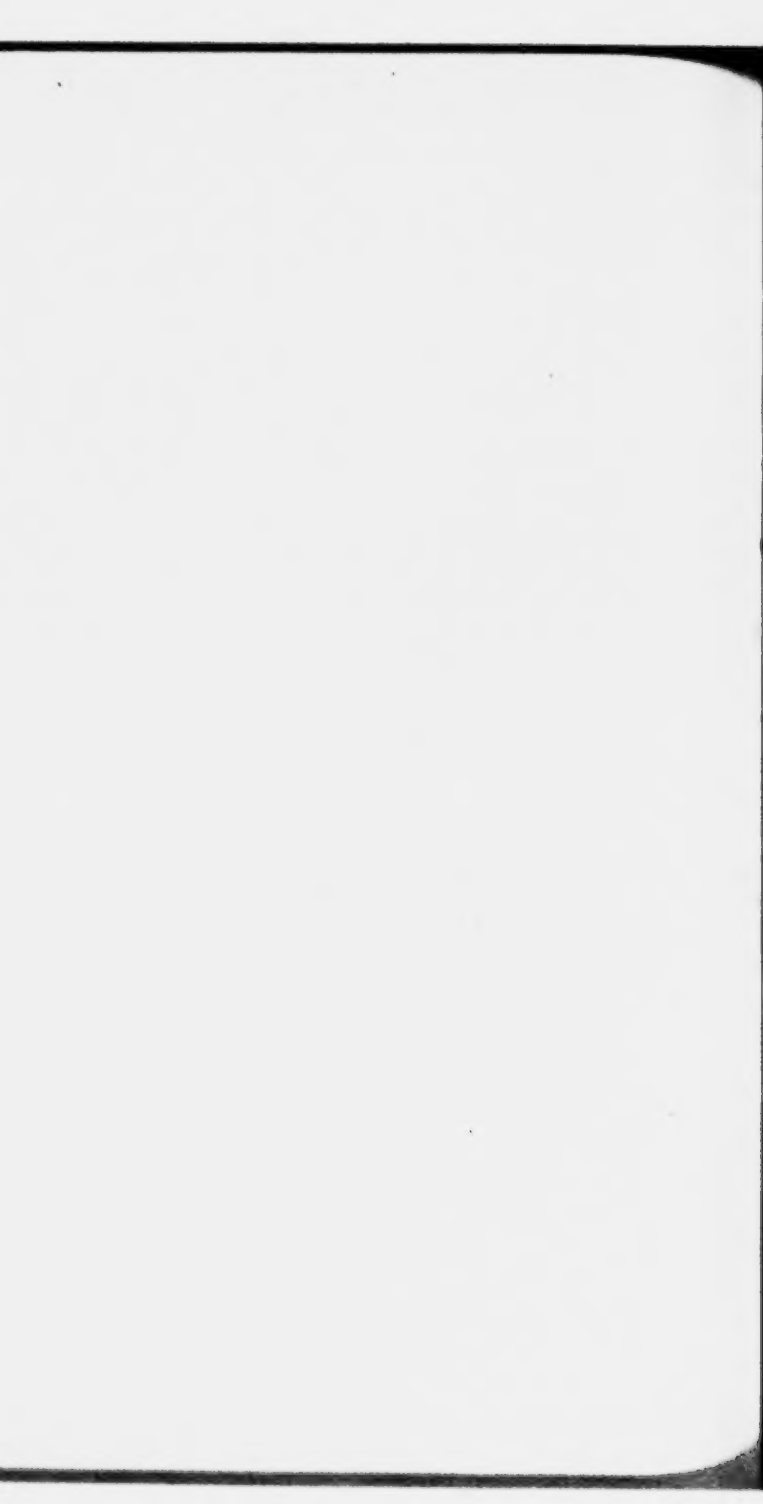
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No.

**IN THE MATTER OF THE PETITION FOR A WRIT
OF HABEAS CORPUS FOR HARRY A. GROBAN
AND NATHAN GROBAN.**

JURISDICTIONAL STATEMENT.

I. The Supreme Court of Ohio's decision pertaining to this matter is reported in *164 O. S., 26*. A copy of said decision is appended to this statement.

II. This is a proceeding for a writ of habeas corpus. The Supreme Court of Ohio in its decision rendered July 13, 1955, found that *Section 3737.13* of the Revised Code of Ohio permitted the state fire marshal to refuse to permit the petitioners-appellants to have counsel present to repre-

sent them at the hearing, and that said statute was not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The notice of appeal from this decision was filed on October 10, 1955, in the Supreme Court of Ohio.

III. This court has jurisdiction of this case pursuant to 28 U. S. C., 1257 (2).

IV. The following cases sustain the jurisdiction of this court:

- (a) *Wolf v. Colorado*, 338 U. S., 25, 93 L. Ed., 1782;
- (b) *U. S. v. Pitt*, 144 F. 2d, 169.

V. The text of *Section 3737.13* of the Revised Code of Ohio is as follows:

"Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

VI. The state fire marshal conducted the investigation under favor of *Section 3737.08 et seq.* of the Revised Code of Ohio. The fire marshal pursuant to *Section 3737.13* of the Revised Code ordered counsel for the petitioners-appellants from the room and commenced the investigation.

Question: Is *Section 3737.13* of the Revised Code of Ohio in violation of the rights of the petitioners-appellants as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

VII. On January 22, 1954, a fire occurred on the premises of the Dresden Mills, Inc., Dresden, Ohio, which is owned, controlled and operated by the petitioners. Shortly thereafter the state fire marshal started an investigation as to the cause of the fire and pursuant to said investigation

subpoenaed the petitioners, together with all of the records pertaining to the operation of the petitioners' business. The petitioners appeared in accordance with the subpoena, accompanied by their counsel. The state fire marshal refused to permit the petitioners to have counsel present at the investigation and demanded that the petitioners take oath and testify after excluding the presence of their counsel. The petitioners refused to be sworn and to testify for reason that they were not permitted to be represented by counsel. Thereupon the state fire marshal committed the petitioners to the sheriff of Franklin county, Ohio, to be incarcerated until they testified. The petition for a writ of habeas corpus was filed in the Franklin county Common Pleas Court and the constitutional question was immediately raised by the following language appearing in the petition:

"Petitioners say they believe they have legal and constitutional rights to have legal counsel to advise them of their rights at all times and especially at this hearing."

Judge Clifford of the Court of Common Pleas of Franklin county, Ohio, on pages two (2) and three (3) of his decision stated:

"Counsel for petitioners contends that the State Fire Marshal has either exceeded his bounds in assuming too much power, thereby failing to exercise his functions within the meaning of the statute Section 3737.13, or, that said statute is unconstitutional."

"* * * therefore, finds that the Sheriff of Franklin County, Ohio, is holding the petitioners, subject to bond set by the Court, pursuant to a valid commitment made by the State Fire Marshal in accordance with the statutes, held to be constitutional by this Court."

The decision of the Common Pleas Court was appealed and again the constitutional question was raised as appears from the language of the Court of Appeals on page three (3) of the opinion written by Judge Miller:

"The next question presented is whether this statutory construction denies the appellants a right or privilege guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States * * *"

The constitutional question was again raised and passed upon by the Supreme Court of Ohio. The following language appears on page 28 of the decision of the Supreme Court of Ohio:

"The remaining contention of the appellants is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States * * *"

"Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought."

VIII. The fire marshal by the legislature is clothed with the sole unrestrained and unlimited power to call before him any person supposed to be cognizant of any facts or to have means of knowledge in relation to the matter concerning which an examination is required to be made, and may require the production of any book, paper, or document, then and there at his pleasure.

If the fire marshal or one of his assistants is of the opinion that there is evidence sufficient to charge a person with arson or a similar crime, he shall arrest such person or cause him to be arrested and charged with such offense.

There are no provisions limiting or restraining the fire marshal in regard to the time or manner the hearing is to

be conducted. He is solely vested with the power to determine what questions are to be asked, how they shall be asked, and what book, paper or document shall be produced. Apparently such powers are not enough. The fire marshal of the state of Ohio is invested with the authority, which no court claims, of denying a witness counsel, even in the face of a request for the same. So clad with all this power, who is to say he will use it discreetly and properly, or improperly, and arbitrarily?

The legislature does not have the power to grant the fire marshal that which he herein is attempting to exercise. The individual has certain rights as a citizen, and no legislative body can invest a fellow citizen, layman or professional, with such arbitrary power. No judicial tribunal in this country has attempted to arbitrarily deprive a citizen of counsel when the same was requested. Such power is in violation with an individual's rights as afforded by the Fourteenth Amendment of the federal Constitution.

Although the Fourteenth Amendment to the U. S. Constitution is not shorthand for the first eight amendments of said Constitution, this latter amendment places definite restrictions upon any state action as is shown by the language of the United States Supreme Court in the case of *Wolf v. Colorado*, 338 U. S., 25, 93 L. Ed., 1782, such language being as follows:

"This clause exacts from the states for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty', * * *."

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities.

It is the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Emphasis supplied)

The language of the Fourteenth Amendment to the United States Constitution clearly gives the individual certain rights as a citizen of the United States. In keeping with these rights, this writer feels that the decision rendered in the case of *United States v. Pitt*, 144 F. 2d, 169, is indeed enlightening. In that case the defendant was contesting the validity of certain sections of the Selective Service Act. Judge Biggs in delivering the opinion for the Third Circuit stated:

"Section 625.1 (b) of the Regulations provides, however, that no person other than the registrant may appear in person before a local board. This is in effect a denial of the right to be represented by counsel before the Selective Service agencies. *While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process*, the proceedings before the selective service agencies are not within that category. It will be observed moreover—he at no time requested the Board to permit counsel to appear on his behalf. He does not assert that his lack of counsel is evidence of denial of due process." (Emphasis supplied)

Although the defendant did not request counsel in the *United States v. Pitt* case, *supra*, nor did he claim the lack of counsel was evidence of a denial of due process, Circuit Judge Biggs thought the matter to be of such a nature as to state:

"The proceedings before the local boards and the appeal boards are informal, stripped of any panoply of formal judicial tribunals. The local boards are com-

posed of persons who are or should be familiar with conditions in the county in which they serve. Frequently they know the registrant and certainly they may not be deemed to be unaware of the problems which confront him. The registrant has the opportunity, if he seeks it, to sit down with the members of his local board and discuss fully with them his status or his claim for exemption. *We doubt if a better, fairer method could be devised to meet the requirement of raising armed forces in an emergency.* We are of the opinion, therefore, that the provisions of the Act afford adequate protection for the rights of the individual registrant, that they afford him due process of law, and that the Act is constitutional in all respects." (Emphasis supplied)

The proceeding referred to in the above quote was but for the purpose of classifying prospective service men. Judge Biggs did not attempt to decide the question on the basis of denial of due process since that question was not raised in the case before him.

Clearly the tenor of the inquiry before the local draft board is indeed in a different category than the investigation of a fire marshal and in particular the investigation apparently being sought to be conducted by the fire marshal in relation to the petitioners.

Since *Section 3737.13* has been interpreted so as to enable the marshal to exclude counsel for a witness, irrespective of the witness's request, the statute permits a deprivation of the rights protected by the Fourteenth Amendment to the Constitution of the United States and is therefore an unconstitutional legislative act.

The administrative branch of both the federal and state governments has developed to such an extent that investigations are being almost continually conducted. The rights of a citizen of the United States appearing before such

investigatory bodies should be determined and, in particular, the question of a witness appearing before such bodies right to counsel is so substantial as to require plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

GRAHAM, GRAHAM, GOTTLIEB & JOHNSTON,

✓ ERNEST B. GRAHAM and

no JAMES F. GRAHAM,

Of Counsel,

Citizens National Bank Bldg., Zanesville, Ohio,

Attorneys for Petitioners-Appellants.

APPENDIX A.

Opinion—Common Pleas Court.

(Rendered this 21st day of April, 1954.)

Clifford, J.:

Petitioners have invoked the jurisdiction of this court by a petition in habeas corpus to obtain their release from incarceration in the Franklin county, Ohio, jail to which they were ordered committed by the state fire marshal by virtue of Section 3737.99 (A), Revised Code of Ohio for violation of Section 3737.12 of the Revised Code; for their refusal to be sworn and refusal to testify in the investigation of the fire at Dresden Mills, Inc. on January 22, 1954, at 12:30 a. m.

The pertinent facts, as alleged in the petition and disclosed by the record of the proceedings before the state fire marshal on March 1, 1954, are these: That Nathan Groban and Harry Groban were subpoenaed by the state fire marshal, under Section 3737.11 of the Revised Code, as witnesses in an investigation. They appeared accompanied by their counsel, Mr. Ernest Graham. The fire marshal determined that the investigation should be private, under Section 3737.13, Revised Code, excluding Mr. Graham. Nathan Groban and Harry Groban then refused to be sworn and testify, giving the exclusion of their counsel as the reason therefor. They were specifically apprised of the statutes setting forth the powers of the fire marshal, and still refused to be sworn, to testify, or to state whether they had complied with the subpoena duces tecum.

Thereupon, the fire marshal, by virtue of Section 3737.99 (A), Revised Code, committed them to the county jail.

Counsel for petitioners raises the following issue:

Does the state fire marshal have the power to compel a witness to testify under oath after refusing the witness's request for his legal counsel to be present?

Counsel for petitioners contends that the state fire marshal has either exceeded his bounds in assuming too much power, thereby failing to exercise his functions within the meaning of the statute Section 3737.13, or, that said statute is unconstitutional. On the other hand, counsel for respondents contend that the sheriff of Franklin county, Ohio, is holding the petitioners, subject to bond set by the court, pursuant to a valid commitment made by the state fire marshal in accordance with the law. Comprehensive briefs have been filed by both counsel to support their respective contentions.

The court finds that the opinion of the attorney general, 1941, O. A. G. 3599, states the law applicable to the case at bar, as follows:

Syllabi.

"(1) When an investigation is being conducted by or under the direction of the state fire marshal, to determine the cause, origin and circumstances of a fire (Sec. 824, et seq. G. C.), by the express provision of Section 832, General Code, such investigation may, in the discretion of the fire marshal, be privately conducted. A witness called to testify in such an investigation is not entitled to counsel, nor may counsel appear with and speak for a witness if the fire marshal determines that the investigation shall be private.

(2) The provisions of Section 832, General Code, authorizing and empowering an investigation conducted by, or under the direction of, the state fire marshal, as to the origin, cause and circumstances of a fire, do not contravene Section 10, Article I, or any other section, of the Constitution of Ohio.

(3) Both at common law and under the Constitution of Ohio, including Section 10, Article I, no person can be compelled to be a witness against himself. This

privilege is a strictly personal privilege, to be claimed by the interested person.

(4) The question of whether or not testimony given by a witness in the public or private investigation of the cause, origin and circumstances of a fire by, or under the direction of, the state fire marshal, may be introduced in the trial of such witness in case he be subsequently indicted and tried, either as a confession, an admission against interest, or for the purpose of impeachment, is one for the courts of this state, rather than this office, to determine."

By virtue of the law, logically reasoned and established in said attorney general's opinion, this court adopts such law as its own opinion as to what the law is and ought to be as applicable to the case at bar, and therefore, finds that the sheriff of Franklin county, Ohio, is holding the petitioners, subject to bond set by the court, pursuant to a valid commitment made by the state fire marshal in accordance with the statutes, held to be constitutional by this court.

The petition contains no allegation of fact which entitles petitioners to the relief sought. The relief prayed for is denied.

Bond set aside and petitioners remanded to custody.

APPENDIX B.

Opinion—Court of Appeals.

(Rendered on the 8th day of October, 1954.)

Miller, J.:

This is a law appeal from the judgment of the Common Pleas Court denying the appellants herein relief from a prison sentence on a writ of habeas corpus.

The record discloses that on January 22, 1954, a fire occurred on the premises of the Dresden Mills, Incorporated,

Dresden, Ohio, which is owned, controlled and operated by the appellants. Shortly thereafter, the state fire marshal started an investigation as to the cause of the fire and pursuant to the same subpoenaed the appellants together with all the records pertaining to the operation of their business. They appeared in accordance with the subpoena, accompanied by their counsel. The state fire marshal refused to permit the appellants to have counsel present at the investigation and ordered that the appellants take oath and testify after excluding the presence of their counsel. The appellants refused to be sworn and testify for the reason that they were not permitted to be represented by their attorney. Thereupon the state fire marshal committed the appellants to the sheriff of Franklin county, Ohio to be incarcerated until they were willing to testify.

The error assigned is that the court erred in its interpretation of Section 3737.13 of the Revised Code of Ohio, and that its judgment is contrary to law. This section of the Code provides:

“Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined.”

The trial court held that under this section of the Code the fire marshal has a discretionary power to determine whether or not his investigation shall be in private and if so, that counsel for a witness may not be permitted to be present at the hearing. We think the court properly construed the construction of the Code under consideration. The law seems to be well established that where a statute is plain and unambiguous the terms thereof shall be con-

strued to have their ordinary meaning. It not only provides that the investigation may be private but it goes further and defines the meaning of the word "private", to wit, "the marshal may exclude * * * all persons other than those required to be present * * *." Clearly, counsel for a witness is not a person whose presence is required before a fire marshal may proceed with the investigation; hence, his presence may be denied if so ordered by the marshal.

The next question presented is whether this statutory construction denies the appellants a right or privilege guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio. The appellants' brief states that "It is a fundamental principle that the first ten amendments to the federal Constitution are solely restrictions on the federal government and provide no limitations as to state governments." It states, however, that their interpretation should be valuable to the issues here by way of analogy. The cases cited, however, deal primarily with the principle of self incrimination which is not the issue in this case. It is not the contention of the appellee that the state fire marshal can compel a person called before him in an investigation to answer a question which would incriminate him. Therefore, the cases cited referring to these amendments cannot be helpful in deciding the matter before this court.

We shall next give consideration to Article I, Section 10 of the Ohio Constitution which provides in part:

"In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * no person shall be compelled, in any criminal case, to be a witness against himself; * * *."

It is to be noted that the amendment refers only to criminal cases, but the right of a witness in other proceedings to assert the privilege has been upheld in numerous cases. 42 O. Jur., 48. Therefore, whatever privileges are granted in criminal cases are also available to the appellants in this proceeding. It is merely an investigation for the purpose of determining the cause, origin and circumstances of the fire and whether or not a crime has been committed. The privilege is a personal one and does not extend to all questions which might be asked of a witness. The time for the assertion of the privilege is after the witness has been sworn and not before. *State v. Cox*, 87 O. S., 113. These appellants refused to be sworn and no questions were asked upon which the privilege could have been exercised. In the case of *Burke v. State*, 104 O. S., 220, the court held that a witness is presumed to know his constitutional privileges and that it was not necessary that he be instructed on the same before answering incriminating questions. At page 229 of the *Burke* case, Chief Justice Marshall says:

"It is claimed that *Burke* was not advised as to his constitutional rights, or cautioned against testifying to any matters which might tend to incriminate him. This privilege has always been treated as a personal privilege to be claimed by the interested party, and in the absence of his claiming the privilege, or refusing to testify, he will be deemed to have voluntarily testified. We know of no authority or rule of law which makes it obligatory upon the grand jury or the prosecutor in charge of the grand jury to advise the witness as to his constitutional rights and privileges, or to caution him in any respect. In this matter, as in all other matters, the witness will be presumed to know the law and therefore will be presumed to have knowledge of his constitutional rights and guaranties, and if he does not claim them without being cautioned the presumption arises that his testimony was voluntarily given."

If it was not obligatory upon those in charge of the grand jury to inform the witness of his privileges it would not seem that the presence of his counsel could be demanded for this same purpose in a somewhat similar proceeding. The same constitutional principles should be applied to investigations by a fire marshal as to those by a grand jury. In the case of the latter it will be noted that the statute prescribes that the prosecutor may be present and interrogate witnesses or advise on legal matters, but counsel for a witness is necessarily excluded. The fire marshal's investigation is one step removed from that of the grand jury. If he finds that a crime has been committed "he shall furnish the prosecuting attorney such evidence with the names of the witnesses, and a copy of the material testimony taken in the case." R. C. 3737.10. The reasons for secrecy before a grand jury are that it is in the furtherance of justice. 24 Am. Jur., 865. And it is for the same reason that R. C. 3737.13 was enacted permitting the fire marshal to conduct private investigations.

We have examined the opinion of the trial court and are also in accord with the reasons he assigned in denying the writ to the appellants.

We find no error in the record and the judgment will be affirmed.

Wiseman, P. J., and Hornbeck, J., concur.

APPENDIX C.**Opinion—Supreme Court of Ohio.**

(Rendered on the 13th day of July, 1955.)

Weygandt, C. J.:

In Re Groban Et Al.

Fire marshal—Investigations—May be private—Exclusion of persons not required to be present—Witnesses—Not entitled to be represented by counsel—Not compelled to testify against themselves—Privilege against self-incrimination asserted, how—Section 3737.13, Revised Code, not violative of constitutional provisions.

1. Under the provisions of Section 3737.13, Revised Code, the state fire marshal may conduct a private investigation to determine the cause of a fire, and he may exclude from the place where such investigation is held all persons other than those required to be present.
2. If the fire marshal determines that such investigation shall be private, a witness called to testify therein is not entitled to be represented therein by counsel.
3. In such investigation a witness can not be compelled to testify against himself.
4. To assert the privilege against self-incrimination, a witness must first be sworn.
5. The provisions of Section 3737.13, Revised Code, are not violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States or of the provisions of Section 10 of Article I of the Constitution of Ohio relating to self-incrimination and the right to representation by counsel.

(No. 34244—Decided July 13, 1955.)

Appeal from the Court of Appeals for Franklin County.

In the Court of Common Pleas the petitioners instituted this action for a writ of habeas corpus in order to secure

their release from the county jail to which they were sentenced by the state fire marshal for refusal to be sworn or to testify in an investigation which that official conducted concerning a fire on the premises of the Dresden Mills, Inc., Dresden, Ohio, on January 22, 1954.

The relief was denied by the trial court.

On an appeal to the Court of Appeals on questions of law, the judgment of the Court of Common Pleas was affirmed.

The cause is in this court on an appeal as of right on the ground that a debatable constitutional question is involved.

Messrs. Graham, Graham, Hollingsworth, Gottlieb & Johnston, for appellants.

Mr. Frank H. Kearns, prosecuting attorney, and Mr. Earl W. Allison, for appellee.

Weygandt, C. J. The investigation by the state fire marshal was conducted under favor of Section 3737.08 et seq., Revised Code.

The provisions under question in this action are those contained in Section 3737.13, Revised Code, which read as follows:

"Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The reason given by the appellant petitioners for their refusal to be sworn or to testify was that the state fire marshal refused to permit them to have counsel present to represent them at the hearing.

The first contention of the appellants is that under the provisions of the above quoted statute the fire marshal is not authorized to exclude counsel for a witness. However,

the language is broad and provides clearly that "the marshal may exclude * * * all persons other than those required to be present." There is no intimation that counsel for a witness is required to be present.

The remaining contention of the appellants is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States and of the provisions of Section 10 of Article I of the Constitution of Ohio, the latter of which read in part as follows:

"In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel * * *. No person shall be compelled, in any criminal case, to be a witness against himself * * *."

As observed by the lower courts, there are several reasons why these provisions are inapplicable to the instant investigation. There is no "trial" or "criminal case" pending; there is no "accused party"; this matter is not pending in "any court"; self-incrimination is not involved, inasmuch as the fire marshal agrees that the appellants can not be compelled to testify against themselves; the privilege is personal; and these appellants have not even been sworn, as this court held necessary in the case of *State v. Cox*, 87 Ohio St., 313, 101 N. E., 135, before the privilege can be asserted.

Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought.

Judgment affirmed.

Judgment affirmed.

Matthias, Hart, Zimmerman, Stewart, Bell and Taft, JJ.,
concur.

APPENDIX D.**Entry—Supreme Court of Ohio.**

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at \$.

Ordered, that a special mandate be sent to the Court of Common Pleas of Franklin county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals, of Franklin county, "for entry."